VARNUM
RIDDERING SCHMIDT HOWLETT LLP
ATTORNEYS AT LAW

251 NORTH ROSE STREET • FOURTH FLOOR
KALAMAZOO, MICHIGAN 49007-3823

TELEPHONE 269 / 382-2300 • FAX 269 / 382-2382 • WWW.VARNUMLAW.COM

JOHN W. ALLEN
BOARD CERTIFIED CIVIL TRIAL ADVOCATE (NBTA)
AMERICAN BOARD OF TRIAL ADVOCATES (ABOTA)
ADMITTED IN ILLINOIS, INDIANA, MICHIGAN, MINNESOTA, WISCONSIN AND FLORIDA

DIRECT DIAL 269/553-3501
E-MAIL jwallen@varnumlaw.com

June 29, 2011

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

Email: MSC_Clerk@courts.mi.gov

Re: Comments and Proposals relating to:
PROPOSALS TO AMEND THE MRPC (ADM File No. 2011-05); Proposed Amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2 and 8.4 of Professional Conduct.

To The Michigan Supreme Court:

I am a Michigan lawyer with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys).[1] In the past, I have served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan (SBM)Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and currently chair the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section. For several years, I have had the honor of serving as Chair and Moderator of the annual ICLE Ethics Panel and Seminar.

This letter contains the views of me only, not those of the Firm, ICLE, the State Bar of Michigan, the ABA, nor their Committees.

INTRODUCTION AND SUMMARY

The proposed Amendments follow a pattern of verbatim transporting parts of the language currently in the Comments into the formal text of the disciplinary Rules of MRPC. While the Comments contain valuable suggestions, they are not, and never have been, intended as a basis for discipline. Their wording is precatory, aspirational, and therefore, by its very nature, frequently imprecise. For the most part, the wording of the Comments derives directly

[1] I acknowledge the thoughtful contributions of my partners, Terry Decker and Terry Bacon, and by the State Bar of Michigan Standing Committee on Professional Ethics.

from the American Bar Association (ABA) Comments to the Model Rules of Professional Conduct. Having personally participated in the drafting process, I can attest that the language of the ABA Comments is often the product of negotiation and compromise, but invariably reflects the conclusion that the wording in the Comments should **not** be part of any disciplinary rule, nor serve as a basis for discipline.

There is considerable history that supports this conclusion. The Model Rules of Professional Conduct (RPC) were, themselves, produced largely in response to misuses and abuses of the various parts of the former Code of Professional Responsibility (CPR). The former Code consisted of three components: **Canons**, which were broad rubrics of general principles (e.g., former Canon 9: A Lawyer shall Avoid the Appearance of Impropriety); **Disciplinary Rules** (DR), which contained requirements for lawyer conduct, the violation of which could serve as the basis for professional discipline; and **Ethical Considerations** (EC), which were aspirational tenets and guidelines intended only to support and explain the Canons and DRs, but not to serve as a basis for discipline.

Over time, the ECs were abused by both disciplinary authorities and civil litigants, who seized upon them, wrongly characterizing them as standards of conduct and bases for discipline, and for civil claims and defenses. The ABA's "Kutak Commission" properly recognized this abuse, and thus recommended a new set of Rules of Professional Conduct, consisting only of disciplinary Rules and their respective Comments, but no "Ethical Considerations." The Kutak Commission also made clear that only a violation of the disciplinary Rules was to be used as a basis for professional disciplinary sanction against lawyers. Since their inception in the 1980s, the ABA Model Rules of Professional Conduct have always been accompanied by a "Preamble and Scope," which has included:

> "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."

The Michigan Supreme Court has historically and consistently followed this same principle.

> "**This Court allows publication of the Comments only as 'an aid to the reader,' but they are not 'authoritative statement[s].**' The rules are the only authority."
>
> *Grievance Administrator v Deutch*, 455 Mich 149, 164; 565 NW2d 369 (1997). (Emphasis added.)

There are good reasons for the historical distinctions between the wording and language of the Rules, as distinguished from the Comments, which support why the language of the Comments is

not appropriate for use as a basis for professional discipline, and therefore should not be incorporated into the Rules. In Michigan, MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (past conforming conduct, no injury, lack of intent) affect only punishment, not culpability. See *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).

While the words of the Comments might reflect "good practices," their use in the disciplinary Rules are likely to be a source of mischief. Vague and undefined terms could be used as a basis for *per se* disciplinary violations, despite the existence of strong mitigating evidence such as actual client consent, lack of intent, lack of damage, or strong empirical evidence that the alleged "misconduct" was preferable for the client.

Moreover, amendments to MRPC must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, either directly or indirectly, as a platform for malpractice claims and other civil litigation such as fee disputes. *Cf., Beattie v. Firnschild*, 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, §52. In the 21st century, Michigan lawyers are far more likely to encounter the MRPC in a civil, rather than disciplinary, context.

In the most recent amendments to the ABA Model Rules of Professional Conduct, the newly-revised Scope, part [20] makes the concession that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." The *Restatement* takes a similar position. Restatement (Third) of the Law Governing Lawyers, § 52(2) & CMT.f (2000) (rule violation "may be considered by a trier of fact as an aid in understanding an applying" the duties of competence and diligence required to meet standard of care).

Even though the most recent amendments to the Michigan Rules of Professional Conduct have retained (in the Comment and "Preamble" to MRPC 1.0 (Scope and Applicability of Rules and Commentary) the admonition that the MRPC "are not designed to be a basis for civil liability," nevertheless the MRPC continue to define the "standard of care" for lawyers in civil lawyer professional liability cases. The changes proposed by Adm. File 2011-05 hold the real potential to increase civil claims, and also to create new ones which do not now exist.

In addition, there is legitimate concern that changes that use terms such as "should' or "reasonable" in the Model Rules will make it even more difficult to obtain summary disposition or summary judgment based on the lawyer's proven conformity with the Rules' requirements. If the Model Rules are changed to a "reasonable lawyer" standard, the question of what a "reasonable" lawyer would do, or should have done, will become a jury fact question, virtually eliminating summary disposition and summary judgment, and automatically vesting any such claim with some value. This is a radical, and unwarranted, change from current law. It should not be adopted in any of the MRPC.

Such a change will also complicate the lawyer's defense of "aiding and abetting" and of other claims in which the plaintiff admits (or it is uncontroverted) that the lawyer did not "know" of the client's wrongdoing, but the plaintiff (usually after the fact) alleges that a "reasonable lawyer" would (or should) have figured it out from what the lawyer did know, or "should have known."

This is not merely theoretical, nor minor. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also the increasing genre of Attorney Grievance Commission (AGC) complaints, and Attorney Discipline Board (ADB) proceedings, which, at base, are really civil fee disputes or claims for negligence. It will increase the cost of those proceedings and thus the Bar dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

MRPC is not the vehicle to cure lawyer incompetence or professional negligence. Too much of this has already crept into the former Model Code of Professional Responsibility DR 6-101(a) in remaining Code jurisdictions, and into the Model Rules of Professional Conduct Rules 1.1 and 1.3.

Nor is MRPC a vehicle to control lawyer's fees or costs. Long ago, the U.S. Supreme court ruled that illegal. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The amount of fees is a matter to be settled in the private marketplace in a contract or implied contract between client and lawyer.

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. MRPC is not the cure for everything. While some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to remedy every lawyer error, or to settle every fee dispute. Attempting to regulate lawyer competence with the MRPC, is like trying to teach driver education by using only speeding tickets. Lawyer competence is better addressed by training, continuing education, and specialized programs such as certification.

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and have not attempted to bring disciplinary proceedings based on isolated negligence, instead demanding: strong evidence of a course of conduct indicative of a refusal or inability to change; or, negligence combined with other factors (abandonment, non-feasance), which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Tellam, Bradley, *"Isolated Instances of Negligence as a Basis for Discipline,"* July, 2003, 149-152. When subjected to strict liability, quasi-criminal sanctions, citizens (including lawyers) should not be relegated to depending upon prosecutorial discretion, alone.

Even if the proposed amendments would not likely result in any change in the current practices of the AGC/ADB in most cases, nevertheless, they would increase the likelihood that the disciplinary process might be transformed into a ramp for civil actions.

This is particularly true when the vague and precatory wording of many of the proposed amendments would place lawyers in a position such that they would not know in advance how to conform their conduct to the requirement of the law and the Rules of Professional Conduct. A lawyer would be compelled to guess at what was "right," at the risk of losing the license to practice law. That is just not fair.

SPECIFIC RESPONSES TO SPECIFIC PROPOSALS

Having these general principles in mind, most all of the proposed amendments are infirm, and should not be adopted in their present forms. The following are specific responses to some of the specific proposals:

Rule 1.2 Scope of Representation

The proposal seeks to amend Rule 1.2 adding a new subpart (b) which states:

> "A lawyer shall assume responsibility for technical and legal tactical issues, but should defer to the client about matters that do not directly pertain to the case, such as expenses to be incurred or concerns the client may express regarding third parties who may be affected adversely."

A mandatory assumption of responsibility for "technical and legal tactical issues" should be accompanied by definitions of precisely what is a "technical and legal tactical issue." Presumably, "tactical" issues are to be distinguished from "strategic" or other issues. In the normal operation of the attorney-client relationship, a client frequently desires to, and has to right to control both "technical" and "tactical" issues, for which the client bears ultimate responsibility. To mandate these responsibilities as being assumed by the lawyer contradicts frequently encountered empirical evidence.

Moreover, deference to the "client about matters" cannot be effectively administered as a discipline requirement when accompanied by the helping verb "should," which makes impossible any determination by either the lawyer or the disciplinary authority of whether or not it is a "requirement" or simply a "suggestion."[2]

[2] Popular culture recognizes both the difficulty and absurdity of a lack of precision in rule making. As Captain Jack Sparrow says while explaining the mythical *Pirate Code* in the Walt Disney film *Pirates of the Carribean*, "Well, the Code is not really Rules; they are more like 'guidelines.'" In a Walt Disney movie, that approach is a vehicle for humor. In the Rules of

The proposed amendment to Rule 1.2, adding a new subsection (b) should be rejected.

Rule 1.3 Diligence

The proposal would add the following to the requirements of lawyer diligence:

> "including providing clarification, preferably in writing, about when and whether a client-lawyer relationship exists."

This amendment proposes to require a lawyer to provide an opinion to the client about when and whether a client-lawyer relationship exists, as part of the mandatory standard of "reasonable diligence." Such "clarification" is not as easy as it sounds. This Court has repeatedly admonished both lawyers and clients that the existence of the attorney-client relationship is fact-driven, and not dependent upon the payment of a fee or a formal contract, though a contract may be implied by the parties' conduct. *Macomb County Taxpayers Association v L'Anse Cruse Public Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997).

The *Restatement* also recognizes the complexity of this determination at § 14:

> "Formation of a Client-Lawyer Relationship.
> A relationship of client and lawyer arises when:
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> (2) a tribunal with power to do so appoints the lawyer to provide the services."

The complexity and factual examination necessary to determine whether a client-lawyer relationship exits, and when it commences, are the reasons why the Rules of Professional Conduct have ever attempted to define that relationship or those events. This being so, it is simply unfair to require the lawyer to provide an opinion to each and every client "clarifying" those issues.

In addition, the "preferably in writing" terms are also improperly imprecise to be included in a disciplinary Rule. The term "preferably" allows for a writing to be used, or not to be used. But it provides no criteria by which the lawyer may determine when the writing will be

---

Professional Conduct, it is vehicle for subjecting a lawyer to discipline, which may extend all the way to revoking the license to practice law.

"preferred," and when it will not. If the intent of the amendment is to require a writing for every engagement (except possibly those in which producing the writing at the time of the engagement is impractical), then it should say so. However, just such a proposal has been recently rejected by this Court. Therefore, one must assume that the requirement of a writing for all engagements is **not** the intent of the amendment.

If the intent of the amendment intends to require writings in some engagements, but not in others, then it should define which are which. In those instances in which this Court has required written engagements (e.g., contingent fee agreements), it has done this, or the legislature has done so by statute, or it has been adopted by court rule, with precise definitions of scope. In every instance, both the circumstances in which it is required, and the terms required to be within the writing, have been defined with precision. The proposed amendment to Rule 1.3 does neither of these.

If, on the other hand, the intent of the amendment is to encourage (but not require) writings to define the terms of the engagement (including who is and who is not the client), that is a laudable goal, but better left to remain in the Comment.

One alternative method of doing so would be to adopt a rule which would induce lawyers to use written engagements, and to clarify those factors which control the type of dispute most often encountered between the lawyer and client – namely, the fee dispute.

One such method to encourage, but not mandate express writings regarding the terms of engagement, and fee agreements, would be to adopt a rule similar to that earlier adopted by and long-used in Florida, adding a new provision to Rule 1.5(g) and (h), as follows:

> **"(g) Consideration of all Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All relevant factors set forth in this rule must be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.**
>
> **(h) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through methods not in compliance with these Rules, prohibited by this Rule, or clearly excessive as defined by this Rule."**

The sources for this proposal are: MCL 600.919; and the *Rules Regulating the Florida Bar*, Rule 4-1.5. The wording is taken from Florida Rule of Professional Conduct 4-1.5, where it has operated successfully and without adverse effect for several years. When adopted, the additional language should serve to reduce markedly the burden on disciplinary authorities and courts when fee disputes arise.

In principle, it is also already the law of Michigan, pursuant to MCL §600.919, which states that:

> The measure of compensation of members of the bar is left to the express or implied agreement of the parties, subject to the regulation of the Supreme Court.

The Amendment would also place a premium upon express fee agreements between lawyers and clients, without specifically requiring "written" agreements for every engagement. Thus, the amendment would encourage what is generally regarded as a good practice, but what many appropriately regard to be unsuitable and impractical as a mandatory Rule for all engagements.

This type of amendment would be a salutary addition to the Michigan Rules. But the amendment to Rule 1.3 as proposed, should be rejected.

Rule 1.5 Fees.

Of all of the proposed amendments, this has the greatest potential for abuse and mischief. Of particular concern is the second sentence of the proposed addition of a new subsection (b):

> "(b) a lawyer shall not perform the lawyer's duty using inefficient or wasteful procedures in order to exploit a fee arrangement."

The lack of any definition of the terms "inefficient" or "wasteful," together with the mandatory "shall" will transfer every disagreement or dispute about a lawyer's fees into a disciplinary offense and basis for a Request for Investigation to AGC. This both depreciates the value of the disciplinary system and its superior quality of deterrence, and will certainly result in overburdening the administrative resources of the Attorney Grievance Commission (AGC) and the Attorney Discipline Board (ADB).

No lawyer will ever know in advance what this Court means by the words "inefficient" or "wasteful." Disciplinary proceedings on these topics will invariably require expenditure of tremendous amounts of money and time on expert witnesses and opinion evidence, with no hope that any lawyer will ever have the ability to know in advance how to translate the vague terms of the amendment into dollar and cents values reflected in fee statements. Moreover, since the Rules of Professional Conduct compromise a strict liability, quasi-criminal disciplinary matrix, factors traditionally considered in "reasonable fee" determinations (such as attorney judgment and other practical considerations) might be relegated only to mitigation factors deemed irrelevant to the principal culpability determination by the disciplinary authority. In other words, every client complaint that the "procedure" has been "inefficient" or "wasteful" will be regarded as the basis for a Rules violation, and thus encourage every client with a fee dispute to file a grievance first and then negotiate the fee dispute holding that over the attorney's head.

The proposal to amend Rule 1.5 should be rejected. A better approach would be to amend Rule 1.5(g) and (h) as described above.

God Bless America,

VARNUM

John W. Allen

JWA/djb

4385163_1.DOC